PREPARED BY THE COURT:

JERSEY CITY MUNICIPAL UTILITIES AUTHORITY, a public corporation organized under the laws of the State of New Jersey, and THE CITY OF JERSEY CITY, a municipal corporation of the State of New Jersey, *Plaintiffs,* **v.** **TOWN OF DOVER, TOWN OF BOONTON, BOROUGH OF ROCKAWAY, TOWNSHIP OF ROCKAWAY, TOWNSHIP OF DENVILLE, TOWNSHIP OF RANDOLPH, BOROUGH OF VICTORY GARDENS, TOWNSHIP OF BOONTON, BOROUGH OF WHARTON, all municipal corporations of the State of New Jersey, THE WHARTON SEWERAGE AUTHORITY, THE RANDOLPH TOWNSHIP MUNICIPAL UTILITIES AUTHORITY, and ROCKAWAY VALLEY REGIONAL SEWERAGE AUTHORITY, all public corporations organized under the laws of the State of New Jersey,** *Defendants.*	**SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MORRIS COUNTY DOCKET NO: MRS-L-1313-10** **Civil Action** **JUDGMENT**

THIS MATTER, having been opened to the Court by way of a Complaint filed by Plaintiffs, Jersey City Municipal Utilities Authority and City of Jersey City, by McAndrew Vuotto, LLC, with opposition by Rockaway Valley Regional Sewerage Authority (RVRSA), et al., (by Maraziti Falcon, LLP, attorneys for RVRSA; David C. Pennella, Esq., attorney for Town of Dover; John P. Jansen, Esq., attorney for Townships of Boonton and Denville, and the Town of Boonton; Richard Harris Beilin, Esq., attorney for Township of Rockaway and Borough of Rockaway; Feintuch Porwich & Feintuch, attorneys for Borough of Victory Gardens; The Buzak Law Group, LLC, attorneys for Township of Randolph and the Randolph Township Municipal Utilities Authority; and Johnson & Johnson, attorneys for the Borough of Wharton and the Wharton

Sewerage Authority); and the Court having conducted a trial and considered the papers submitted, and for the reasons stated in the accompanying Statement of Reasons, and for good cause shown; therefore,

IT IS, on this 31st day of **October** 2018;

ORDERED, that:

1. **PARTIAL JUDGMENT** is entered in favor of Defendants, insofar as:
    a. Plaintiffs are responsible for their proportional share of such projects that involve repair, operation, maintenance, or upkeep because the RVRSA "Project" as defined in the 1971 Stipulation is "maintained in operation," as stated in the 1971 Stipulation's Paragraph 7.
    b. Plaintiffs' proportional share of costs, as set forth in Paragraph 6(c) of the 1984 Stipulation, shall be guided by the definitions in the attached Statement of Reasons.
    c. Plaintiffs breached the agreement with the RVRSA by withholding contributions to continued operation, repair, and maintenance since January 2010.
        i. To the extent, if any, RVRSA assessed impermissible costs under the definitions provided in the attached Statement of Reasons, those costs shall offset damages, if any, arising from the breach.
2. Plaintiffs' Motion to Conform Pleadings to Evidence is **DENIED**;
3. A trial shall be scheduled for the bifurcated issue of damages; the Case Management Conference shall occur on November 16, 2018, at 2:00 P.M.

HON. STUART A. MINKOWITZ, A.J.S.C.

A copy of this Order and an accompanying Statement of Reasons has been served upon all parties by the Court.

Jersey City Municipal Utilities Authority, et al., v. Town of Dover, et al.

MRS-L-1313-10

STATEMENT OF REASONS

I. Background and Procedural History

a. Parties

This matter arises out of a dispute between Plaintiffs, Jersey City Municipal Utilities Authority ("JCMUA") and the City of Jersey City ("Jersey City") (collectively, "Plaintiffs") and Defendants, Town of Dover ("Dover"), Town of Boonton ("Boonton"), Borough of Rockaway ("Rockaway Borough"), Township of Rockaway ("Rockaway Township"), Township of Denville ("Denville"), Township of Randolph and Randolph Township Municipal Utilities Authority (collectively, "Randolph"), Borough of Victory Gardens ("Victory Gardens"), Township of Boonton ("Boonton Township"), Borough of Wharton and the Wharton Sewerage Authority (collectively, "Wharton") (collectively, the "Municipal Defendants"), and the Rockaway Valley Regional Sewerage Authority ("RVRSA") (collectively with the Municipal Defendants, "Defendants") concerning a settlement agreement which the parties entered into in 1971 and amended in 1984. Joint Exhibit ("JE") 34, ¶ 89.

Plaintiff, Jersey City, is a municipal corporation having its principal place of business located at City Hall, 280 Grove Street, Jersey City, New Jersey 07302. Id., ¶1. Jersey City is located in Hudson County, with approximately 230,000 residents, and owns a reservoir ("Reservoir") located in the Township of Parsippany ("Parsippany"), that provides the source water for the residents of Jersey City. Jersey City owns the land on which the Reservoir is located and pays local property taxes to Parsippany. Id. Plaintiff JCMUA is a municipal utilities authority established by Jersey City in accordance with N.J.S.A. 40:14B-1, et. seq., maintaining an address at 555 Route

440, Jersey City, New Jersey. Id., ¶2. Under its franchise agreement with Jersey City, JCMUA is responsible for the operation and management of the Jersey City Water System, including the Reservoir, through the year 2027. Id. JCMUA provides water and sewer services to Jersey City residents and, by virtue of its franchise agreement with Jersey City, JCMUA incurs Jersey City's obligations for capital, operating and maintenance costs assessed to Jersey City by the Rockaway Valley Regional Sewerage Authority. Id. (Jersey City and the JCMUA are sometimes collectively referred to as "Jersey City.")

Defendant Dover is a municipal corporation having its principal place of business located at 37 N. Sussex Street, Dover, New Jersey 07801. Id., ¶3. Defendant Boonton is a municipal corporation having its principal place of business located at 100 Washington Street, Boonton, New Jersey 07005. Id., ¶4. Defendant Rockaway Borough is a municipal corporation having its principal place of business located at 1 E. Main Street, Rockaway, New Jersey 07866. Id., ¶5. Defendant Rockaway Township is a municipal corporation having its principal place of business located at 65 Mount Hope Road, Rockaway, New Jersey 07866. Id., ¶6. Defendant Denville is a municipal corporation having its principal place of business located at 1 St. Mary's Place, Denville, New Jersey 07834. Id., ¶7. Defendant Randolph is a municipal corporation having its principal place of business located at 502 Millbrook Avenue, Randolph, New Jersey 07869. Id., ¶8. Defendant Randolph MUA is a public corporation organized under the laws of the State of New Jersey, maintaining a principal address at 502 Millbrook Avenue, Randolph, New Jersey 07869. Id., ¶14. Defendant Victory Gardens is a municipal corporation having its principal place of business located at 337 South Salem Street, Victory Gardens, New Jersey 07801. Id., ¶9. Defendant Boonton Township is a municipal corporation having its principal place of business located at 155 Powerville Road, Boonton Township, New Jersey 07005. Id., ¶10. Defendant

Borough of Wharton is a municipal corporation having its principal place of business located at 10 Robert Street, Suite 2, Wharton, New Jersey 07885. Id., ¶11. Defendant Wharton Sewerage-Authority is a public corporation organized under the laws of the State of New Jersey, maintaining a principal address at 10 Robert Street, Suite 2, Wharton, New Jersey 07885. Id., ¶13. Defendant RVRSA is a public corporation organized under the Sewerage Authorities Law, N.J.S.A. 40A:14-1 et seq., and the Municipal Defendants and Jersey City are members of the RVRSA. Id., ¶17. RVRSA treats the municipal sewage generated by the Municipal Defendants and the Municipal Authority Defendants at its plant located behind the Parsippany Reservoir. Id. RVRSA's treatment facilities are connected to RVRSA's main sewage transmission line, from which it receives sewage. Id. The main sewage transmission line is connected, directly or indirectly, to sewage collection lines of each of the Municipal Defendants and the Municipal Authority Defendants. Id.

b. History

In 1899, Jersey City reached an agreement with the Jersey City Water Supply Company ("JCWSC") that JCWSC would secure and provide Jersey City with the water rights for 70 million gallons per day ("mgd") of water from the Rockaway River. JE-314 (Joint Stipulation of Facts, or "JSOFs,") ¶1. The contract also provided for the construction of a reservoir by erection of a dam where the Rockaway River flows into Boonton, N.J. and a 23-mile aqueduct to deliver water from the Reservoir to Jersey City. Id. In 1904, water began flowing from the Boonton Reservoir to Jersey City pursuant to the agreement. Id.

Plaintiffs aver that, shortly after it began utilizing the Reservoir, Jersey City grew concerned about the pollution of the Rockaway River by municipal sewage from municipalities located upstream of the Reservoir. JE-34, ¶19. Therefore, Plaintiffs state, in order to protect the quality of its drinking water, Jersey City sought to develop a treatment facility to treat the sewage

generated by the Municipal Defendants as well as a delivery system to bring the sewage to the treatment facility. Id. Consequently, on December 29, 1913, Jersey City sent Dover a draft agreement in which, among other things, Jersey City agreed to, at its own expense, construct, operate and maintain an interceptor sewer line and sewage treatment plant to treat sewage generated in Dover, and Dover agreed to construct a sewage collection system and to connect it to the interceptor sewer line. See JE-1.

Hence, on or about May 19, 1916, Jersey City and Dover entered into an agreement whereby Jersey City agreed to, at its own expense, construct, operate and maintain an interceptor sewer line and sewage treatment plant to treat sewage generated in Dover, and Dover agreed to construct a sewage collection system and to connect it to the interceptor sewer line. JE-314 ¶2. On September 18, 1924, Jersey City and Rockaway Borough entered into an agreement containing the above-described terms of the Jersey City-Dover agreement, and which also provided that Rockaway would adopt ordinances requiring all buildings to connect to lateral sewers to be constructed by Rockaway, which in turn would be connected to Jersey City's interceptor sewer line. JE-314 ¶3. The agreement between Jersey City and Rockaway Borough was to be for a term of 40 years or as long as Jersey City used the Rockaway River as a potable water supply. JE-2 at 4.

Accordingly, Jersey City constructed an interceptor ("Original Interceptor") and treatment plant ("Original Treatment Plant"), which were put in operation in 1928 when Dover connected its sewage collection system to the Original Interceptor. JE-314 ¶4. Jersey City entered into similar agreements with the other Municipal Defendants, as follows: Town of Boonton on March 23 and June 1, 1931; Township of Rockaway on November 17, 1953, June 18, 1954 and October 13, 1964; Township of Denville on March 27, 1952, September 3, 1953, November 30, 1964 and

March 3, 1966; Wharton Borough on May 18, 1954; Randolph Township on March 3, 1966; and with Victory Gardens and Boonton Township during the same period. JE-314 ¶5.

Between 1950 and 1960, the population of Morris County, wherein the Municipal Defendants are located, increased significantly. JE 34 ¶26. Thus, in 1953, Jersey City completed an expansion of the treatment capacity of the Original Treatment Plant from 2 mgd to 5.4 mgd. JE-314, ¶6. Upon inspection of the Original Treatment Plant, the Department of Health (DOH) concluded that the plant was discharging inadequately treated sewage into the Rockaway River. Id., ¶7. The DOH issued an Order, dated April 27, 1967, which required Jersey City to make improvements to its treatment plant, such that the effluent discharged by the treatment plant met applicable DOH standards. Jersey City was required to meet the standards by no later than October 30, 1970. Id.

On July 12, 1968, Hudson County Superior Court Chancery Division issued an Order requiring Jersey City to repair the treatment works at the Original Treatment Plant and to file the engineering report required by the DOH Order on or before November 30, 1968. Id. ¶8; see JE-4. On December 12, 1968, Jersey City filed a lawsuit (hereinafter the "1968 Litigation") seeking to rescind or terminate its agreements with the Municipal Defendants, or to reform and modify the agreements so that the Municipal Defendants would share the burdens of compliance with the DOH Order and Court Order. JE-314 ¶9. The parties to the 1968 Litigation entered into a Stipulation of Settlement ("1971 Stipulation"), which was filed with the Court on July 30, 1971. Id., ¶11.

The 1971 Stipulation provided that "a Regional Sewerage Authority shall be formed pursuant to the provisions of N.J.S.A. 40:14A-1 et seq." to take over ownership and operation of the Original Facilities. Id., ¶12; see JE-7. The Regional Sewerage Authority was required to

construct an interceptor sewer and to "construct and/or acquire and/or enlarge a new sewage treatment facility at such site as shall be determined by said Authority and approved in accordance with the laws of the State of New Jersey....The Regional Authority will attempt to complete the project within 3 years of date of take-over of City plant at Boonton." JE-314, ¶13. Under the 1971 Agreement, the "project" is defined as the "new treatment facility and interceptor and appurtenances." JE-7 ¶7.

Paragraph 4 of the 1971 Stipulation states that "[a]ny and all Federal, State or any other public funds that are paid over to the Regional Authority shall be given pro-rated allocation to the project costs shares of the City and the Regional [sic] based upon the formulas set forth in 6a, hereinafter." Id., ¶4. Paragraph 6 of the 1971 Stipulation thus set forth the following:

> 6. Jersey City shall pay over to the Regional Authority, at such times as shall be determined by the Authority, the following amounts.
>
> (a) A capital or principal amount equivalent to an amount that bears the same ratio to the total and complete local cost of the project that 4.5 million gallons per day bears to the total daily treatment capacity of the new treatment plant and the interceptor and appurtenant facilities which comprise the "project":
> i.e. City Share =
>
> Total Cost Treatment Plant x 4.5 mgd/Total Daily Capacity Treatment Plant
>
> + Total Cost Interceptor Sewers And Appurtenant Facilities x 4.5 mgd/Total Daily Capacity of Interceptor Sewers
>
> (b) An amount which represents its share of the annual operating, maintenance, repair and upkeep expenses of the project bearing the same ratio to the total annual operating, repair, and maintenance costs that 4.5 million gallons per day bears to the average daily plant flow:
>
> i.e. City Share =
>
> Total Annual Operating Repair and Maintenance x 4.5 mgd/Average daily plant flow
>
> [Id., ¶6.]

Furthermore, under the 1971 Agreement, "[u]pon complete repayment of all interest and principal for the original project cost," Jersey City is not "responsible for further principal and interest expenses;" however, Jersey City is responsible "for their share of operating, repair and maintenance costs as long as the 'project' is maintained in operation." Id., ¶7.

The RVRSA was organized on November 29, 1971 as the Regional Sewerage Authority contemplated in the 1971 Stipulation. JE-314 ¶14. On April 1, 1972, Jersey City conveyed the Original Facilities to RVRSA. Id., ¶15. On or about June 30, 1976, RVRSA entered into a grant agreement with the U.S. Environmental Protection Agency ("EPA") for construction of the new interceptor sewer line (the "RVRSA Interceptor"). Id., ¶19. In 1978, the Township of Parsippany-Troy Hills filed a lawsuit against RVRSA, Jersey City, the Municipal Defendants and others, in the United States District Court for the District of New Jersey to enjoin construction and funding of the new treatment facilities (the "RVRSA Treatment Plant") and RVRSA Interceptor under the Clean Water Act, Endangered Species Act, the National Environmental Policy Act of 1969 and other federal statutes.[1] The District Court denied the injunction, and the United States Third Circuit Court of Appeals affirmed the decision in October 1980. Id., ¶20. As of June 1982, RVRSA had not constructed the new interceptor or new treatment plant. Id., ¶21.

On or about June 9, 1982, Jersey City filed a petition (the "1982 Litigation"), naming RVRSA and the Municipal Defendants, and seeking to modify its financial obligations to the RVRSA, contending that "[a]lthough the RVRSA has been organized and functioning since April 1, 1972, no new plant has been constructed…costs of engineering, design and construction of a treatment plant have increased substantially….Meanwhile, however, plaintiff's revenues have

[1] The Federal Clean Water Act, 33 U.S.C. § 1251, et seq., was adopted in 1972 and established procedures for obtaining Federal funds for construction of treatment works; The Federal Endangered Species Act, 16 U.S.C. § 1531, et seq., was adopted in 1973 and established legal requirements relating to potential impacts of federally funded projects on endangered species. JE-314, ¶¶17-18.

declined." Id., ¶22; JE-9, ¶¶14, 16. On or about September 30, 1982, RVRSA entered into a grant agreement with EPA for construction of the RVRSA Treatment Facilities. Id., ¶23. Beginning in 1983, RVRSA issued bonds to finance a portion of the costs of construction of the RVRSA Treatment Plant and RVRSA Interceptor, which was not funded by Federal or State grants. Id., ¶25.

On August 17, 1984, the parties settled the 1982 Litigation with an Amendment to the 1971 Stipulation of Settlement ("1984 Stipulation.") Id., ¶24. Paragraph 6 of the 1971 Stipulation was amended in the 1984 Stipulation as follows:

1. Paragraph 6 of the [1971] stipulation shall be amended to read as follows:

> 6. Jersey City shall pay over to the authority, at such time as shall be determined by the Authority, the following amounts.

a. A capital or principal amount equivalent to an amount that bears the same ratio to the total and complete local cost of the project that 4.5 million gallons per day bears to the total daily treatment capacity of the new Treatment Facilities, (segments I and II), less Five Hundred Thousand ($500,000) Dollars.

i.e. Jersey City Share =

Total local cost Treatment Plant (Including Segment II) x (4.5 mgd/12 mgd) - $500,000

b. A capital or principal amount equivalent to an amount which bears the same ratio to the total and complete local cost of the New Interceptor that 4.5 million gallons per day bears to the total daily treatment capacity of the new Interceptor.

i.e. Jersey City Share =

Total local cost Treatment Plant x (4.5 mgd/21mgd)

c. An amount with which represents Jersey City's Share of the operating maintenance, repair and upkeep expenses of the New Treatment Facilities and New Interceptor, bearing the same ratio to the total annual operating, maintenance, repair that 4.5 million gallons per day bears to the average daily plant flow,

i.e. Jersey City Share =

Total Annual Operation, Repair, Maintenance and Upkeep Expenses	x	4.5 mgd / Average Daily Plant Flow

d. The parties hereby stipulate 12 mgd as the capacity of the New Treatment Facilities (Segments I and II), and further stipulate 21 mgd as the capacity of the New Interceptor.

e. Jersey City shall not be obligated to contribute to any future expansion of the new Treatment facilities beyond the 12 mgd capacity

f. Jersey City specifically stipulates and acknowledges its obligation to pay for its share of the construction costs of Segment II of the new Treatment Facilities (sludge handling and disposal), the construction of which segment has not yet begun, in accordance with the formula set forth in paragraph 6(a) above.

g. The obligation of Jersey City to pay for the construction of the New Treatment Facilities pursuant to Paragraph 6(a) above shall remain unchanged and shall not in anyway be affected by the receipt of any future Federal and/or State funding by the authority.

[JE-23, ¶6.]

RVRSA constructed the RVRSA Treatment Plant in two segments, completing construction of Segment I in 1985 and Segment II in 1990. JE-314 ¶¶26-27. In 1985, RVRSA completed construction of the RVRSA Interceptor, a 14.7-mile long sewer line that connects the service areas of the RVRSA to the RVRSA Treatment Plant. Id., ¶28. RVRSA completed construction of the four branch interceptors that feed into the main interceptor in 1987. Id., ¶29.

In 1992, RVRSA issued $28,836,626.95 Sewer Revenue Refunding Bonds ("1992 Bonds") in connection with repayment of the portion of costs of the RVRSA Treatment Plant and the RVRSA Interceptor that was funded by debt and not covered by grants from the EPA. Id., ¶31. Upon repayment of the 1992 Bonds, all principal and interest for the original project costs of RVRSA's Interceptor and Treatment Plant was repaid. Id., ¶32. The 1992 Bonds were repaid in annual installment payments by RVRSA, through 2009, when they were fully repaid; RVRSA had

received funds to make such payments from Jersey City and the Municipal Defendants through that time. Id., ¶33.

c. RVRSA Operations and Obligations

RVRSA now maintains and operates the sewer plant, rated at 12 mgd, which serves the member municipalities. There is a Board that directs the RVRSA's operations. The Board has smaller subcommittees, which discuss issues before bringing them up to the full Board. Personnel and operations handles matters involving the plant operations, including major equipment acquisitions. 3T 20:23-27:1.[2]

RVRSA's wastewater treatment facilities treat influent wastewater on a continuous basis: 24 hours a day, 7 days a week, 365 days a year. JE-314, ¶89. RVRSA's wastewater treatment operations must continually comply with the Willis Act and conditions of a New Jersey Pollutant Discharge Elimination System ("NJPDES") permit issued by the New Jersey Department of Environmental Protection. Id., ¶90.

The RVRSA has an obligation to properly treat wastewater that is sent to the plant in order to keep the Rockaway River clean. 8T 5:13-16. The RVRSA engineers and Executive Director have discretion in how they operate the Plant to meet the permit requirements. 8T 5:17-6:6. The Board does not give guidance to the RVRSA. 8T 6:7-14. Members entrust the RVRSA to do the proper things to treat the wastewater. 8T 6:15-19. Members rely upon the RVRSA to properly

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[2] 1T refers to the trial transcript of Oct. 24, 2017 (AM).
2T refers to the trial transcript of Oct. 24, 2017 (PM).
3T refers to the trial transcript of Nov. 13, 2017 (PM).
4T refers to the trial transcript of Nov. 27, 2017.
5T refers to the trial transcript of Dec. 14, 2017.
6T refers to the trial transcript of Dec. 19, 2017 (AM).
7T refers to the trial transcript of Feb. 14, 2018.
8T refers to the trial transcript of Mar. 3, 2018.
9T refers to the trial transcript of Mar. 13, 2018 (PM).
10T refers to the trial transcript of May 1, 2018.
11T refers to the trial transcript of May 3, 2018.

measure wastewater flow and keep accurate records to properly assess towns for annual charges. 8T 6:20-7:7. Public funds from the member municipalities are used to pay the RVRSA its annual service charges and to run the RVRSA plant. 8T 7:8-14. The RVRSA has an obligation to the people of the municipalities it services to properly use the public money and to run the plant effectively. 8T 7:15-22. The RVRSA is intended to enable its member municipalities and current and future users to send, receive, treat, and process its wastewater in a safe and economical way. 10T 170:2-11.

d. Instant Litigation

The debt to construct the new plant was paid off in 2009, and Jersey City had made all of its required payments per the formulas that are provided in the 1984 Stipulation. 3T 58:3-59:11. Once the debt was paid in 2009, the cost associated with the sludge thickening facilities, the biosolids upgrades, and the sewer rehabilitation cost became maintenance, upkeep, and repair of the system. 3T 54:11-56:19. In a November 16, 2009 letter to John Folk, Director of Finance for JCMUA, RVRSA distinguished between capital projects and Operations and Maintenance ("O&M"), and indicated RVRSA had undertaken the "Bio Solids Project" and "Interceptor Rehabilitation," and characterized both as capital projects. See JE-32. The letter was authorized by RVRSA Executive Director Ho. Loans taken out through the NJ Environmental Infrastructure Trust ("EIT") provided 100% of the funding for the two projects referred to in the November letter. See JE-36. RVRSA makes payments of principal and interest on that funding, and is assessing a portion of that to Jersey City. 3T 69:17-71:19; JE-32. In January 2010, Jersey City filed the Complaint in the instant matter, seeking to "stop and redress increasingly unfair treatment and inequitable assessments." See JE-34. Effective with the January 2010 payment, Jersey City also

began withholding the debt portion on the building related to the sludge thickening facilities and the biosolid and sewer rehabilitation projects. 3T 58:3-59:11; JE-35.

On July 19, 2010, the RVRSA issued a letter recalculating how it formulates and computes the discount amount for Jersey City's participation. RVRSA remarked that the existing payment obligations for the year 2010, calculated in December 2009, incorrectly applied paragraphs 6(a) and 6(b) of the 1984 Settlement to the payment obligations, noting that "these formulas apply only to costs incurred…for the initial construction of the existing RVRSA Treatment Facilities and Intercepter." JE-49. As a result, RVRSA was "recalculating member municipalities' shares of the cost of Rehabilitation Projects [operating, maintenance, repair and upkeep of the RVRSA Treatment Facilities and Intercepter] utilizing the formula at 6(c)." Id. RVRSA thus reclassified the costs of the biosolids project and the interceptor rehabilitation project from capital costs to O&M costs. Id.; 3T 76:8-12.

RVRSA's Executive Director testified that the change in characterizing the projects from capital to "operating, maintenance, repair and upkeep" occurred because there was "confusion" with the word "capital" in the Stipulations, and even though the projects are "capitalized in a financial sense they are nevertheless part of the operation, maintenance, repair, upkeep of the plant." 3T 76:13-24. RVRSA's Executive Director has acknowledged that capital projects, under rules and regulations outlined by the New Jersey Department of Community Affairs and from an accounting perspective, are those that cost $3,000 or more and have a tangible use and life span of five years. 3T 78:4-13. Additionally, if a project costs more than $3,000 and it has a life of 5 years or more, Sandy Thai, the CFO of RVRSA, instructed that it be in the capital budget, as set forth in an RVRSA resolution. 10T 157:3-19.

i. The Amended Complaint

1. Count One

Plaintiffs sought judgment declaring that: (i) Plaintiffs have no further obligation to contribute towards RVRSA's capital costs; and (ii) that certain RVRSA projects are capital costs, not "operating, maintenance, repair or upkeep" expenses.

2. Count Two

Plaintiffs seek a judgment declaring that the 1984 Stipulation is void because it has gone on for a reasonable time. Plaintiffs seek a judgment declaring that the 1984 Stipulation is void because Plaintiffs have substantially performed under the Agreement for 47 years, whereas RVRSA has materially breached the 1984 Stipulation. Plaintiffs seek a judgment declaring that the 1984 Stipulation is void because the 1971 and 1984 Stipulations violate the CWA, and the underlying public policies of water conservation and pollution abatement. Plaintiffs seek a declaration that the 1971 and 1984 Stipulations are void as a result of RVRSA's breaches of fiduciary duty.

3. Count Three

Plaintiffs seek damages for RVRSA's breach of the 1984 Stipulation as a result of RVRSA's misapplication of the $500,000 credit owed under Paragraph 6(a) of the 1984 Stipulation.

4. Count Four

Plaintiffs seek a judgment declaring that Plaintiffs are no longer obligated to contribute towards RVRSA's operating, maintenance, repair or upkeep costs because the RVRSA "project" as defined in the 1971 Stipulation is no longer "maintained in operation," as stated in the 1971 Stipulation's Paragraph 7.

5. Counter-Claim

Defendant RVRSA counterclaims that Plaintiffs breached the 1984 Settlement Agreement by withholding payments for projects that they do not believe are operation, maintenance, and upkeep.

e. Motion to Amend Pleadings to Conform to Evidence at Trial

Plaintiffs' Motion to Conform Pleadings to Evidence presented at trial is opposed by Defendants. Plaintiffs filed their initial Complaint in this action on January 7, 2010. Certification of John P. Vuotto, Esq., dated June 22, 2018 ("Vuotto Cert."), at ¶2; Pl. Ex. A. Plaintiffs and Defendant RVRSA each made summary judgment motions in February 2013. Vuotto Cert. at ¶3. The Court entered a Partial Summary Judgment Order on August 18, 2014. Id. at ¶4. In the Partial Summary Judgment Order, the Court ordered that the Second Count of Plaintiffs' Complaint "is dismissed to the extent that it includes rights or claims that were or could have been raised at the time of the 1984 Settlement Agreement." Id. at ¶5; Ex. B at p. 1. On September 8, 2014, Plaintiffs filed a Motion for Leave to File an Amended Complaint pursuant to R. 4:9-1. JE-67. Plaintiffs sought to include a claim that their obligation to pay operation, repair, and maintenance costs has expired because the 1971 Stipulation provides that the obligation expires when the "project" is no longer "maintained in operation." Id. The Court granted Plaintiffs' Motion on March 3, 2015. Id. Plaintiffs filed an Amended Complaint on March 13, 2015. Id.

Plaintiffs' Amended Complaint alleges Four Counts: (I) for a declaratory judgment that Plaintiffs have no responsibility to continue contributing to the capital costs of the RVRSA; (II) a declaratory judgment voiding the Amendment to Stipulation of Settlement starting July 30, 1971 (the "Settlement Agreement") between the parties as untenable and violative of public policy; (III) for damages as a result of RVRSA's incorrect assessment of Plaintiffs for RVRSA's capital costs

(i.e., from RVRSA's incorrect application of the $500,000 credit owed to Plaintiffs under the Settlement Agreement); and (IV) a declaratory judgment that Plaintiffs are no longer obligated to contribute towards the RVRSA's operating, repair and maintenance expenses because the "project" referenced in the Settlement Agreement is no longer "maintained in operation." Vuotto Cert. at ¶8.

At trial, and in connection with Plaintiffs' Second and Fourth Counts, Plaintiffs introduced four distinct categories of evidence to support their argument that the Settlement Agreement should be voided. Those four categories are as follows: (i) the Settlement Agreement cannot be perpetual, because it has been in effect for more than a reasonable time and, under all of the circumstances, it should be declared void; (ii) Plaintiffs substantially performed under the Settlement Agreement, whereas RVRSA has materially breached the Settlement Agreement; (iii) the Settlement Agreement violates the CWA and the Federal public policy of water conservation; and (iv) RVRSA breached its fiduciary duty – specifically, by re-characterizing its capital projects as "operating and maintenance," misapplying the $500,000 credit, filing baseless and retaliatory counterclaims (such as the one demanding $95 million in damages), and advocating the municipal defendants' position rather than remaining neutral during this dispute – warrant that the Settlement Agreement be voided at this time. Id. at ¶9.

On June 22, 2018, Plaintiffs filed a Motion to Conform Pleadings with Evidence presented at trial. Defendants assert that Plaintiffs' motion must be denied insofar as it seeks to amend the pleadings to add purported claims which this Court has dismissed. Defendants argue that the Court's August 18, 2014 partial summary judgment dismissed all claims that plaintiffs could have asserted before the 1984 Settlement Agreement. Def. Br. at p. 1. Defendants claim that Plaintiffs could have asserted the claim that the Settlement Agreement violated the CWA and certain

regulations promulgated thereunder, each of which were in effect before the 1984 Settlement Agreement. Id. Defendants also seek to dismiss Plaintiffs' motion insofar as it seeks to add a claim that the Settlement Agreement should be voided because it is perpetual or unreasonable. Defendants claim that the August 18, 2014 Order granting partial summary judgment found that the Settlement Agreement was neither perpetual nor unreasonable. Id. Finally, Defendants oppose Plaintiffs' Motion to Amend, insofar as it claims that RVRSA breached a purported fiduciary duty to Plaintiffs by "failing to remain neutral" in this litigation. Id. at 1-2.

II. Analysis

a. Amending Pleadings Under New Jersey Court Rule 4:9-2 and Law of the Case Doctrine

R. 4:9-2 provides:

> When issues not raised by the pleadings and pretrial order are tried by consent or without the objection of the parties, they shall be treated in all respects as if they had been raised in the pleadings and pretrial order. Such amendment of the pleadings and pretrial order as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend shall not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings and pretrial order, the court may allow the pleadings and pretrial order to be amended and shall do so freely when the presentation of the merits of the action will be thereby subserved and the objecting party fails to satisfy the court that the admission of such evidence would be prejudicial in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.
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> [R. 4:9-2.]

The trial court's broad discretion to permit amendment to conform to the evidence is required to be liberally exercised. See, e.g., Kernan v. One Washington Park, 154 N.J. 437, 457 (1998); Cuesta v. Classic Wheels, Inc., 358 N.J. Super. 512, 517 (App. Div. 2003); Oscar v.

Simeonidis, 352 N.J. Super. 476, 489 (App. Div. 2002); Fanarjian v. Moskowitz, 237 N.J. Super. 395 (App. Div. 1989). Where, however, a "beyond the issues as framed" objection to evidence is made, that discretion must be exercised with due regard to the opportunity of the opposing party to meet the evidence. See, e.g., Rivera v. Gerner, 89 N.J. 526 (1982); Colucci v. Oppenheim, 326 N.J. Super. 166, 179 (App. Div. 1999), certif. den. 163 N.J. 395 (2000); Bainhauer v. Manoukian, 215 N.J. Super. 9, 45 (App. Div. 1987); Essex County Adjuster v. Brookes, 198 N.J. Super. 109 (App. Div. 1984); Cola v. Packer, 156 N.J. Super. 77 (App. Div. 1978). The opposing party will ordinarily be deemed to have been on notice sufficient to meet that evidence if the issue has been injected into the case prior to trial even if in a technically deficient manner. See, e.g., Winslow v. Corporate Express, Inc., 364 N.J. Super. 128, 140 (App. Div. 2003) (issue of legal fraud adequately raised by deposition testimony); 68th St. Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 561 (Law Div. 1976), aff'd o.b. 150 N.J. Super. 47 (App. Div.), certif. den. 75 N.J. 20 (1977) (a legal theory advanced neither in the pleadings nor pretrial order may nevertheless be resorted to in the ultimate determination of the controversy where it has been fully aired at trial and in post-trial briefs). See also Aly v. Garcia, 333 N.J. Super. 195, 202 (App. Div. 2000), certif. den. 167 N.J. 87 (2001); Teilhaber v. Greene, 320 N.J. Super. 453, 466 (App. Div. 1999); Walker Rogge v. Chelsea Title & Guar., 254 N.J. Super. 380 (App. Div. 1992); Farese v. McGarry, 237 N.J. Super. 385 (App. Div. 1989).

However, the liberality of the conforming-amendment practice has its limits. See, e.g., Brown v. Port Auth. Police Super., 283 N.J. Super. 122, 137 (App. Div. 1995) (reversing order conditioning dismissal on arbitration where issue of arbitration was never raised); R. Wilson Plumbing v. Wademan, 246 N.J. Super. 615 (App. Div. 1991) (reversing a trial court judgment entered on a cause of action not pleaded, not briefed and not argued by any party); New Mea Const.

Corp. v. Harper, 203 N.J. Super. 486, 492 (App. Div. 1985) (affirming the denial of the motion made and noting that the movant had foregone numerous prior opportunities to amend or seek to amend his pleading). Obviously, a "casual mention" by a party during trial of a theory of recovery unsupported by the evidence and not the subject of a motion to amend does not place that theory or cause of action in issue. Taddei v. State Farm Indem. Co., 401 N.J. Super. 449, 465 (App. Div. 2008). Moreover, if a party declines an express opportunity to amend the pleadings to conform to the evidence, the subject of that declined amendment is a precluded issue on appeal. See Skripek v. Bergamo, 200 N.J. Super. 620 (App. Div.), certif. den. 102 N.J. 303 (1985).

The law of the case doctrine is a nonbinding preclusive doctrine that provides that a court's interlocutory ruling on an issue binds litigants, preventing relitigation of that issue during the pendency of the case. Lombardi v. Masso, 207 N.J. 517, 538 (2011) (citations omitted). "Under the law-of-the-case doctrine, 'where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit.'" Bahrle v. Exxon Corp., 279 N.J. Super. 5, 21 (App. Div. 1995) (quoting Slowinski v. Valley Nat'l Bank, 264 N.J. Super. 172, 179 (App. Div. 1993)), aff'd, 145 N.J. 144 (1996). For that reason, the decision "should be respected by all other lower or equal courts during the pendency of that case." Lanzet v. Greenberg, 126 N.J. 168, 192 (1991) (citing State v. Reldan, 100 N.J. 187, 203 (1985)). Thus, if the doctrine applies, it prohibits "a second judge on the same level, in the absence of additional developments or proofs, from differing with an earlier ruling." Hart v. City of Jersey City, 308 N.J. Super. 487, 497 (App. Div. 1998).

However, the law of the case doctrine is not an absolute rule as "the court is never irrevocably bound by its prior interlocutory ruling[.]'" Jacoby v. Jacoby, 427 N.J. Super. 109, 117 (App. Div. 2012) (citations and internal quotation marks omitted). Thus, when "there is

substantially different evidence" from that available at the time of the prior decision, "new controlling authority, or the prior decision was clearly erroneous[,]" the doctrine does not apply. Sisler v. Gannett Co., 222 N.J. Super. 153, 159 (App. Div. 1987), certif. denied, 110 N.J. 304 (1988). The rule is discretionary, and the doctrine is "applied flexibly to serve the interests of justice." State v. Reldan, 100 N.J. 187, 205 (1985). Moreover, "interlocutory orders are always subject to revision in the interest of justice." Lombardi, 207 N.J. at 536. Under the law of the case doctrine, prior decisions on identical legal issues in the same case should be followed unless the prior decision was clearly erroneous. Franklin Med. Associates v. Newark Pub. Sch., 362 N.J. Super. 494, 512 (App. Div. 2003).

b. Motion to Amend Pleadings to Conform to Evidence at Trial

Plaintiffs allege that there is evidence that the Settlement Agreement was not intended to be perpetual, and has been in effect for more than a reasonable time. Id. at ¶11. The purported evidence includes, but is not limited to: (i) the Settlement Agreement (JE-23), which was executed on July 30, 1971, and amended as of August 17, 1984; (ii) evidence that before the 1971 Stipulation, Jersey City and the municipal defendants had prior agreements whereby Jersey City constructed and operated, at its expense, a previous wastewater treatment facility, which was constructed in 1928 and expanded in 1953 (see JE-314, ¶¶2-6); (iii) testimony of former Corporation Counsel, John Kennedy, regarding Plaintiffs' understanding of, intention, and the parties' negotiations relating to the 1984 amendment to the Settlement Agreement (see, e.g., 1T 23-27; 31-32) (iv) testimony of Jersey City Mayor, Gerald McCann, regarding Plaintiffs' understanding of, intention, and the parties' negotiations relating to the 1984 amendment to the Settlement Agreement (see, e.g., 1T 104-109); (v) testimony of Plaintiffs' expert in planning, design, construction and operation of wastewater treatment facilities, William C. McConnell,

regarding the useful life of wastewater treatment facilities and the specific condition of the RVRSA facilities (see, e.g., 6T 40-46; 51-102; 106-113); and (vi) various other documentary evidence in the Joint Exhibits, such as the RVRSA's asset list (JE-142). Vuotto Cert. at ¶11.

Defendants argue that the Court has already addressed and rejected Plaintiffs' position that the Settlement Agreement cannot be perpetual and should be declared void. Def. Br. at 4. Defendants claim that in the August 18, 2014 Partial Summary Judgment Statement of Reasons, the Court concluded that the 1984 Settlement Agreement is still valid, because the duration is neither perpetual nor unreasonable. Id. Defendants cite the Court's Statement of Reasons as follows:

> [T]he RVRSA is correct that the 1984 Settlement Agreement is not perpetual, but rather terminates when the facility becomes inoperable. The term "operation" does not create a de facto perpetual agreement, and such a strained interpretation ignore the 1984 Settlement Agreement's general purpose, which has a clear and definite ending that occurs after the 12 mgd facility becomes inoperable. The Settlement Agreement is not indefinite; while the exact end is not specified, the Agreement has a set termination trigger.
>
> [Statement of Reasons for Partial Summ. J. (August 18, 2014), at p. 19.]

Defendants also contend that the Court correctly determined that the Settlement Agreement has not lasted for an unreasonable time, because: (1) "...Jersey City agreed to the 1984 Settlement Agreement with knowledge of its future obligation[, and i]ts payments to the RVRSA have remained relatively stable and modest" Id. at 19-20 ; (2) "...Jersey City benefits not only in terms of the quality and quantity of water from RVRSA's treatment facility, but also from bulk water sales" Id. at 20; and (3) "...the 1971 and 1984 Settlement Agreements have not reached a point where Jersey City's payments under the present formula are unreasonable." Id. at 20-21.

Defendants assert that the Court ruled that "[b]ecause the facility is still in operation and an unreasonable period of time has not passed, the Agreement is still valid." Id. at 21.

Defendants further argue that the duration of the Settlement Agreement is authorized by the Sewerage Authorities Law, and therefore, is neither unreasonable nor against public policy. Def. Br. at p. 5, citing Beverly Sewerage Auth. v. Delanco Sewerage Auth., 65 N.J. Super. 86, 96 (Law Div. & Ch. Div.), aff'd, 70 N.J. Super. 575 (App. Div. 1961), aff'd, 38 N.J. 354 (1962) (finding that where statutory authority exists for contracts between municipal corporations, such contracts are not against public policy).

The Court finds that the issue of whether the Settlement Agreement is perpetual or has been in effect for more than a reasonable amount of time was already addressed in the August 18, 2014 Partial Summary Judgment Statement of Reasons and Order. The Settlement Agreement is not perpetual, as it ends when the plant is inoperable. Statement of Reasons for Partial Summ. J. (August 18, 2014), at p. 19. In its decision, the Court also explained that "[b]ecause the facility is still in operation and an unreasonable period of time has not passed, the Agreement is still valid." Id. at 21.

Plaintiffs have not presented any substantially new or different evidence from that available at the time the prior decision was rendered, nor have they presented new controlling authority or evidence that the prior decision was clearly erroneous. Sisler, 222 N.J. Super. at 159. Therefore, Plaintiffs' Motion to Amend the Pleadings to Conform to Evidence, related to the issue of whether the Settlement Agreement is perpetual or has gone on for more than a reasonable amount of time, is denied.

Plaintiffs also allege that they have substantially performed under the Settlement Agreement, whereas RVRSA has materially breached the Settlement Agreement. The purported

evidence that Plaintiffs have substantially performed under the Settlement Agreement includes: (i) documents showing Plaintiffs' payment history, including the Stipulation of Facts regarding Plaintiffs' payments (see, eg., JE-314 at ¶¶34-76); and (ii) testimony of RVRSA's Executive Director, Joann Mondsini, regarding amounts Plaintiffs have paid to RVRSA (see 10T 181). Vuotto Cert. at ¶12. The purported evidence that RVRSA has materially breached the Settlement Agreement is provided by: (i) the Resolutions authorizing the Settlement Agreement (JE-20-22); (ii) unrebutted testimony of Plaintiffs' expert in accounting for governmental entities, Gary W. Higgins, regarding RVRSA's overcharging of Plaintiffs by misapplying the $500,000 credit owed to Jersey City under the Settlement Agreement (see, e.g., 7T 59-74); (iii) testimony of Sandy Thai, RVRSA's CFO, regarding RVRSA's failure to properly apply the $500,000 credit (3T 101-111); (iv) testimony of Paul Cuva, RVRSA's auditor, regarding RVRSA's failure to properly apply the $500,000 credit (5T 18-28); and (v) documentary evidence relating to RVRSA's re-characterization of its capital costs as "operating, repair and maintenance" expenses solely for purposes of billing Jersey City (see, e.g., JE-339, JE-49, JE-61, JE-62, JE-66, JE-221, JE-222, JE-170-175; JE-213-216). Vuotto Cert. at ¶13.

Plaintiffs' claim that they have substantially performed under the Settlement Agreement, whereas RVRSA has materially breached the Settlement Agreement, was addressed by this Court in its April 4, 2017 partial summary judgment, wherein the Court stated:

> Plaintiffs' motion for summary judgment is **DENIED** insofar as they seek declaratory judgment as to whether the Stipulations obligate RVRSA to pay Plaintiffs interest on the $500,000 credit for the alleged misapplication of the $500,000.00 credit. Defendants' motion for summary judgment is **GRANTED** insofar as they are entitled to an Order declaring that the Stipulations do not obligate RVRSA to pay Plaintiffs interest on the $500,000.00, as there is no

> record evidence establishing that the $500,000.00 credit was misapplied.
>
> [Statement of Reasons for Partial Summ. J. (April 4, 2017), at p. 27.]

In the June 26, 2017 Statement of Reasons for the Motion for Reconsideration of the Courts April 4, 2017 Partial Summary Judgment Motion, the Court upheld its decision explaining as follows:

> The "$500,000" sum plainly expressed in paragraph 6(a) of the 1984 Stipulation is clear and unambiguous; it does not refer to any additional credit for accrued interest, nor does it refer to any timeframe in which the credit was to be applied. RVRSA applied an annual credit of $25,000.00 to Jersey City's account for twenty years and in compliance with the express term of the 1984 stipulation.
>
> As such, Defendants' motion for summary judgment was properly granted insofar as they sought an Order declaring that the Stipulations do not obligate RVRSA to pay Plaintiffs interest on the $500,000.00, as there is no record evidence establishing that the $500,000.00 credit was misapplied. Accordingly, Plaintiffs' motion for reconsideration is **DENIED** insofar as it seeks an order permitting it to present Count Three of their Amended Complaint at trial.
>
> [Statement of Reasons for Reconsideration of April 4, 2017 Partial Summary Judgment Motion (June 26, 2017), at p. 27.]

Plaintiffs' claim was fully briefed, argued, and addressed by the Court. The Court permitted Plaintiffs to raise the claim again at trial only because new documents produced immediately prior to trial may have contained evidence that would support Plaintiffs' claim. However, the evidence presented at trial did not provide any new support to the Plaintiffs' claims that Defendants misapplied the $500,000.00 credit. Therefore, the Court's decisions in the April 4, 2017 Partial Summary Judgment Motion, and the June 26, 2017 Motion for Reconsideration of the April 4, 2017 Partial Summary Judgment Motion, remain sound. Consequently, because prior decisions on identical legal issues in the same case should be followed unless the prior decision was clearly erroneous, Franklin Med. Associates, 362 N.J. Super. at 512, Defendants' Motion for Summary

Judgment is granted and Plaintiffs' Motion to Conform Pleadings to Evidence is denied insofar as it alleges that RVRSA has materially breached the Settlement Agreement.

c. CWA Claims

Plaintiffs also allege that the Settlement Agreement violates the CWA and the federal policy of water conservation. The purported evidence includes: (i) that the CWA, adopted in 1972, established procedures for obtaining Federal funds for construction of treatment works (see JE-314, ¶17); (ii) testimony of Ms. Mondsini regarding Jersey City being a user of the RVRSA facilities under the CWA, but not paying a proportionate share (see 10T 171-181); and (iii) testimony of RVRSA's engineering expert, Timothy Bradley, regarding Jersey City being a user of the RVRSA facilities under the CWA (see 11T 90; 94-95). Vuotto Cert. at ¶14.

Defendants argue that Plaintiffs' claims based on the CWA and proportionate use regulations are barred by the Court's August 18, 2014 Partial Summary Judgment Order, as a claim that "could have been raised at the time of the 1984 Settlement." Def. Br. at p. 7. In the alternative, Defendants maintain that Plaintiffs' claim that Jersey City's operation and maintenance obligation violates the proportionate share limitation of the CWA construction grants is belied by the fact that the EPA provided the RVRSA with grants under the program. Id. at 9.

Plaintiffs assert that the CWA provision, which the 1984 Settlement violates, was adopted February 17, 1984, after the Settlement had already been authorized by the RVRSA and Jersey City. Pl. Br. at p. 7. Plaintiffs argue that they do not seek a determination that the 1984 Stipulation must be voided solely because it violates the CWA and public policy; rather, they wish the Court to consider these facts among all of the other facts and circumstances in determining whether the 1984 Agreement should be voided at this time. Id. Finally, Plaintiffs contend that, although the RVRSA was successful in obtaining grants in the face of the 1984 Agreement's violation of the

EPA regulation, it does not establish that the EPA evaluated the 1984 Agreement and approved it, notwithstanding the violation. Id.

Plaintiffs argue that testimony proffered at trial tends to show that the Stipulations violate the CWA because Jersey City is a user of the RVRSA facilities under the CWA, but not paying the proportionate share. However, while that may be an interesting fact in an equitable sense, the fact remains that Jersey City agreed to the terms of the Stipulation.[3] Plaintiffs' Motion to Conform Pleadings to Evidence to add this claim is therefore denied.

d. Fiduciary Duty

Fourth, Plaintiffs allege that RVRSA breached its fiduciary duty and therefore, the Settlement Agreement should be voided. Id. at ¶9. Plaintiffs claim that the RVRSA owed a fiduciary duty to its members through: (i) testimony of Ms. Mondsini regarding the RVRSA's obligations; (ii) testimony of RVRSA Board Members Hector Schorno, Edward Secco, Aurelio Vincitore, and Joseph Lowell (see 8T; see also 9T for Joseph Lowell testimony), regarding the RVRSA's dominant position and reliance by the municipal members. Vuotto Cert. at ¶15. Plaintiffs argue that RVRSA breached its fiduciary duty to Plaintiffs, as demonstrated by: (i) its re-characterization of capital costs as "operating, repair and maintenance" expenses solely for purposes of billing Jersey City (see, e.g., JE-339, JE-49, JE61, JE-62, JE-66, JE-221, JE-222, JE-170-175; JE-213-216); (ii) retaliatory counterclaims (JE-69), which were dismissed on summary judgment; and (iii) overcharging of Plaintiffs by misapplying the $500,000 credit owed to Jersey City under the Settlement Agreement. Vuotto Cert. at ¶16.

[3] Plaintiff has not claimed that the Stipulations were unconscionable. Accordingly "[a]bsent compelling circumstances, settlement agreements are enforced by our courts." Borough of Haledon v. Borough of N. Haledon, 358 N.J. Super. 289, 305 (App. Div. 2003) (citation omitted).

The existence of a fiduciary relationship depends upon the existence of a dominant/superior position between the parties, whereby one party voluntarily places its trust in the other for the benefit of the dominant party. Statement of Reasons for Partial Summ. J. (April 4, 2017), at p. 2; McKelvey v. Pierce, 173 N.J. 26, 57 (2002). Here, Plaintiffs forced the creation of the RVRSA as part of the 1971 Stipulation, negotiated the terms of participation in the RVRSA, and it is a member of the RVRSA with full voting rights. There is no factual or legal support for the claim that there is a fiduciary relationship running from the RVRSA to the Plaintiffs. If anything, the municipal members of the RVRSA owe a fiduciary duty to the RVRSA.

The Court explained, in its April 4, 2017 Statement of Reasons for the Partial Summary Judgment Motion, as follows:

> Plaintiffs' claim is similar to an oppressed minority shareholder action. N.J.S.A. 14A:12-7(1)(c) allows a court to grant relief when controlling shareholders "have acted fraudulently or illegally, mismanaged the corporation, or abused their authority as officers or directors or have acted oppressively or unfairly" toward a minority shareholder.
>
> The question is whether their actions were oppressive. Muellenberg v. Bikon Corp., 143 N.J. 168, 180 (1996). "Ordinarily, oppression by shareholders is clearly shown when they have awarded themselves excessive compensation, furnished inadequate dividends, or misapplied and wasted corporate funds." Id. (citation omitted).
>
> The first New Jersey case to construe N.J.S.A. 14A:12-7(1)(c) was Exadaktilos v. Cinnaminson Realty Co., 167 N.J. Super. 141 (Law Div. 1979), aff'd o.b., 173 N.J. Super. 559 (App. Div.), certif. denied, 85 N.J. 112, 425 (1980). The Court examined the various techniques that controlling members of a close corporation could use to freeze out minority shareholders. Id. at 153. The Court noted that N.J.S.A. 14A:12-7(1)(c) had been enacted in response to the failure of traditional principles of corporate law, such as the business judgment rule, to curb these abuses. Id. at 154.
>
> In determining whether oppression is present, N.J.S.A. 14A:12-7(1)(c) expressly authorizes an examination of corporate

> conduct toward a minority shareholder in the role of shareholder, director, officer or employee. Id. at 153. Oppression is defined as frustrating "a shareholder's reasonable expectations." Brenner v. Berkowitz, 134 N.J. 488, 506 (1993).
>
> The analysis of reasonable expectations should take "account the fact that shareholders in close corporations may have expectations that differ substantially from those of shareholders in close corporations may have expectations that differ substantially from those shareholders in public corporations." Muellenberg, 143 N.J. at 179. Courts should be aware of minority shareholders, their vulnerability and the power of a majority shareholder when "wielding of this power by any group controlling a corporation may serve to destroy a stockholder's vital interests and expectations." Bonavita v. Corbo, 300 N.J. Super. 179, 187-88 (Ch. Div. 1996).
>
> Here it is uncertain what Plaintiffs' reasonable expectations should be with respect to the administration of the RVRSA and the Stipulations generally as the interpretation of the Stipulations is disputed. Furthermore, there is no evidence that the other authority members "acted fraudulently or illegally, mismanaged the corporation, or abused their authority as officers or directors or have acted oppressively or unfairly." N.J.S.A. 14A:12-7(1)(c).
>
> [Statement of Reasons for Partial Summ. J. (April 4, 2017), at pp. 21-23.]

Plaintiffs' evidence at trial did not establish that the RVRSA owes a fiduciary duty to the Plaintiffs. There is only conflicting testimony that, on the one hand, the Board does not guide the RVRSA; on the other hand, the Board does direct RVRSA's operations. 9T 6:7-14; 4T 20:23-27:1. There is no substantially new or different evidence from that available at the time of the prior decision, nor is there new controlling authority, or evidence that the prior decision was clearly erroneous. Sisler, 222 N.J. Super. at 159. Accordingly, Plaintiffs' Motion to Conform Pleadings to Evidence, insofar as it seeks to allege that RVRSA breached a fiduciary duty and, therefore, the Settlement Agreement should be voided, is denied.

e. Contract Interpretation (First and Fourth Count)

When interpreting a contract, the Court must discover, and give effect to, the intention of the parties. Marchak v. Claridge Commons Inc., 134 N.J. 275, 282 (1993); Jacobs v. Great Pac. Century Corp., 104 N.J. 580, 582 (1986) (citing Kearney PBA Local No. 21 v. Town of Kearney, 81 N.J. 208, 221 (1971). Generally, the intention of the parties is "revealed by the language" used in the contract. Karl's Sales & Serv., Inc. v. Gimbel Bros., Inc., 249 N.J. Super. 487, 492 (App. Div. 1991); see also Deerhurst Estates v. Meadow Homes, Inc., 64 N.J. Super. 134, 148 (App. Div. 1960) ("[New Jersey] law requir[es], in the interpretation of a contract, an examination solely into that intent which is expressed or apparent in the writing. An actual intent that is not made known in the instrument will not be given effect"). Also, "[a] basic principle of contract interpretation is to read the documents as a whole in a fair and common sense manner." Hardy v. Abdul-Matin, 198 N.J. 95, 103 (2009); see also Great Atlantic & Pacific Tea Co., Inc. v. Checchio, 335 N.J. Super. 495, 501 (App. Div. 2000). A contract "should not be interpreted to render one of its terms meaningless." Cumberland Cty. Improvement Auth. v. GSP Recycling Co., Inc., 358 N.J. Super. 484, 497 (App. Div. 2003).

When the terms of a contract are clear and unambiguous, they must be enforced as written. County of Morris v. Fauver, 153 N.J. 80, 103 (1998); Malik v. Seaview Lincoln Mercury, 398 N.J. Super. 182, 187 (App. Div. 2008) ("If the terms of a contract are clear, they are to be enforced as written."); Levison v. Weintraub, 215 N.J. Super. 273, 276 (App. Div. 1987) ("Where the terms of a contract are clear and unambiguous there is no room for interpretation or construction and [the court] must enforce those terms as written."); Investors Sav. & Loan Ass'n v. Ganz, 174 N.J. Super. 356, 357 (Ch. Div. 1980) ("When a contract is clear and unambiguous a court is bound to enforce its terms as they are written"). The parties to a contract are free to enter into a contract of

their choosing, and the courts are not empowered to rewrite the contract or to "make a different or better contract than the parties themselves have seen fit to enter." E. Brunswick Sewerage Auth. v. E. Mill Associates, Inc., 365 N.J. Super. 120, 125 (App. Div. 2004); see also Marchak, Inc., 134 N.J. at 281 ("Generally, 'courts should enforce the contracts as made by the parties.'").

However, "[w]here a contract is ambiguous, courts will consider the parties' practical construction of the contract as evidence of their intention and as controlling weight in determining a contract's interpretation." County of Morris, 153 N.J. at 103; Marchak, 134 N.J. at 282 ("Generally, we consider the contractual terms, the surrounding circumstances, and the purpose of the contract"); Bernard v. IMI Systems, Inc., 131 N.J. 91, 109 (1993) ("Under New Jersey Law, courts look to the objective of the parties as manifested by the language in the contract and the circumstances of the surrounding transaction"). The consideration of the circumstances surrounding the formation of the contract, however, may not be used to change the writing, but may only be used for the purpose of determining the meaning of the writing. Casriel v. King, 2 N.J. 45, 50-51 (1949). Additionally, where an ambiguity appears in a written agreement, the writing is to be strictly construed against the drafter. In re Miller's Estate, 90 N.J. 210, 221 (1982); Terminal Construction Corp. v. Bergen County Hackensack River Sanitary Sewer Dist. Authority, 18 N.J. 294, 302 (1955).

In contracts, an ambiguity exists "if the terms of the contract are susceptible to at least two reasonable alternative interpretations." Chubb Custom Ins. Co. v. Prudential Ins. Co. of America, 195 N.J. 231, 238 (2008) (citing Nester v. O'Donnell, 301 N.J. Super. 198, 210, (App.Div.1997)). Where an ambiguity exists, "a court may look to extrinsic evidence as an aid to interpretation." Id. The Court looks to "discover the intention of the parties" when interpreting contracts. Marchak, 134 N.J. at 282. Generally, the court will "consider the contractual terms, the surrounding

circumstances, and the purpose of the contract." Marchak, 134 N.J. at 282; see also, Bernard, 131 N.J. at 109 (noting that "[u]nder New Jersey law, courts look to the objective of the parties as manifested by the language in the contract and the circumstances of the surrounding transaction"). The Court will "read the documents as a whole in a fair and common-sense manner," in accordance with the basic principle of contract interpretation. Hardy, 198 N.J. at 103. If the language is ambiguous, the "court will consider the parties' practical construction of the contract as evidence of their intention and as controlling weight in determining the contract's interpretation." County of Morris, 153 N.J. at 103. Under no circumstances, however, will the court make a "different or a better contract than the parties themselves have seen fit to enter into." E. Brunswick Sewerage Authority, 365 N.J. Super. at 125. Existing statutes and rules of law are always among surrounding circumstances to be considered in determining the intent of parties to a contract. Borough of West Caldwell v. Borough of Caldwell, 26 N.J. 9, 22-23 (1958).

The pertinent language of the Stipulation states that,

> [i]n the event the new treatment facility and interceptor and appurtenances ("project") are expanded or enlarged, the City shall not be responsible for any enlargement or expansion costs. Upon complete repayment of all interest and principal for the original project cost, the City shall not be responsible for any further principal and interest expenses, but shall be responsible for their share of operating, repair and maintenance costs as long "project" is maintained in operation.
>
> [JE-7(emphasis added).]

It is clear from the language and content of the Stipulation that, upon completion of the payments of the bond, Plaintiffs were to continue contributions to the operation, maintenance, and repair of the plant – in essence, preservation of the new plant while it remained in operation. As there were no guiding legal definitions for the Stipulations, the generally understood definitions should be acceptable to guide the interpretation of the terms. Hardy v. Abdul-Matin, 198 N.J. 95, 103 (2009).

i. Declaratory Relief Definitions

The common understanding of preservation is defined as repair, operation, maintenance, and upkeep. JE-23. Regardless of accounting or engineering classification (i.e., operational vs. capital expenses)[4], JCMUA's proportional share of costs, as set forth in Paragraph 6(c) of the Stipulation, shall be guided by the definitions set forth below:

1. Repair – restoration of equipment, components and/or structures (appurtenances) to no more than the functional condition that existed prior to malfunction, defect, damage, or decay. However, restoration may be accomplished by replacement of like-kind if cost of replacement is less than the cost of repair, or if repair is impossible. If restoration cannot be accomplished with like-kind, it may be accomplished with the lowest cost upgrade, improvement, expansion, or enlargement.

2. Operation, maintenance, and upkeep – each term shall be considered interchangeable, and shall be defined as keeping the plant in good functional condition, including all services (i.e., labor), consumables (including utilities and nominally valued supplies and equipment), and/or replacement of equipment, components, and/or structures (appurtenances) that existed or were under actual construction at the time of the pay-off of the bonds in 2009. Such replacement shall be made with like-kind upon the end of a life cycle as defined by the manufacturer/builder, or by a qualified expert when no such life cycle is defined by the manufacturer and/or builder, and which replacement is only necessary to enable the plant to process wastewater at a monthly average of 12 mgd and/or in accordance with applicable law and/or governmental regulation. However, if replacement of like-kind is impossible or exceeds the cost of the lowest cost upgrade, improvement, enlargement, or expansion, the replacement may be accomplished with the lowest cost upgrade, improvement, enlargement, or expansion. Operation, maintenance, and upkeep under this definition shall also include any upgrade, improvement, enlargement, or expansion that is mandated by law and/or government regulation.

3. Enlargement, expansion, improvement or upgrade – each term shall be considered interchangeable and shall include any costs in excess of repair, maintenance, operation, and/or upkeep not otherwise mandated by law or government regulation.

[4] Testimony and evidence at trial confirms that these engineering and accounting terms were not in existence at the time the 1971 Stipulation was executed. See 1T 42:8 – 47:20; 1T 77:10 – 79:7; 2T 73:5 – 80:8.

Notwithstanding the above, nothing herein shall prohibit JCMUA from agreeing to contribute to any improvements, expansion, enlargement, or upgrades. Moreover, JCMUA, regardless of enlargement or expansion, shall nevertheless be responsible for its proportional contribution to all repair, operation, maintenance, and upkeep of the plant while it remains in operation, in accordance with Paragraph 6(c) of the Stipulation.

ii. Count One

Plaintiffs seek a judgment declaring that: (i) Plaintiffs have no further obligation to contribute towards RVRSA's capital costs; and (ii) that certain RVRSA projects are capital costs, not "operating, maintenance, repair or upkeep" expenses.

The intent of the Stipulations, as stated earlier, is preservation, unless and until the plant is not in use; however, it is not in perpetuity. Jersey City is required to contribute towards the repairs, operation, maintenance, and upkeep. Here, by using the terms as intended by the parties, whether a "capital project" is one that cannot be completed in three years and costs over $5,000, is of no moment, as the term is not in either of the relevant clauses of the Stipulations at issue here. Section 7 in both the Stipulations was never modified and reads as follows:

> In the event the new treatment facility and interceptor and appurtenances ("project") are expanded or enlarged, the City shall not be responsible for any enlargement or expansion costs. Upon complete repayment of all interest and principal for the original project cost, the City shall not be responsible for any further principal and interest expenses, but shall be responsible for their share of operating, repair and maintenance costs as long as "project" is maintained in operation.
>
> [JE-7.]

When the terms of a contract are clear and unambiguous, they must be enforced as written. County of Morris, 153 N.J. at 103. The language is clear that Jersey City shall not be responsible for

expansion or enlargement of the facility, nor shall they be responsible for principal and interest expenses upon complete repayment of all the interest and principal from the original project,[5] but shall remain responsible for the share of the operating, repair, and maintenance costs as long as the operation "project," meaning the wastewater treatment facility, is maintained in operation.

If an approved project is one that simply involves repair, operation, maintenance, or upkeep as defined herein, Jersey City is responsible for their proportional share of such projects. If repair is impossible, Jersey City is responsible for their proportionate share of the least cost, like-kind replacement of a component. Therefore, consistent with the definitions set forth above, the Court finds that Jersey City does not have an obligation to contribute towards any of RVRSA's costs that do not qualify as repair, operation, maintenance, and upkeep as defined herein. Furthermore, Jersey City may be eligible for partial judgment, based on the extent, if any, that RVRSA has assessed impermissible enlargement, expansion, or upgrade costs against Jersey City. A separate trial will be scheduled to determine the issue of damages.

iii. Count Four

Plaintiffs seek a judgment declaring that Plaintiffs are no longer obligated to contribute towards RVRSA's operating, maintenance, repair or upkeep costs because the RVRSA "project," as defined in the 1971 Stipulation, is no longer "maintained in operation" as stated in the 1971 Stipulation's Paragraph 7. Jersey City argues that the "project" is no longer in operation because there have been so many additions and replacements to the facility that it cannot be said to be the same "project" and, therefore, is no longer maintained in operation.

Here, it is clear in paragraph 7 of the Stipulations, that the "project" is the new treatment facility and appurtenances. Further, the intent of the parties, with regard to the meaning of

[5] It is undisputed that that all interest and principal from the original projects has been paid.

maintained in operation, which is plain language, has only one reasonable and unambiguous meaning; that the facility and appurtenances continue to process and treat wastewater. Karl's Sales & Serv., Inc., 249 N.J. Super. at 492; Chubb Custom Ins. Co., 195 N.J. at 238. It is clear that the "project" is maintained in operation, as the facility has continued to process and treat wastewater. There is no evidence that the operation has ceased treating wastewater. As long as the facility processes wastewater, regardless of whether parts were replaced or expanded upon, the "project" remains in operation. Therefore, the Court finds that Plaintiffs are obligated to contribute towards RVRSA's operating, maintenance, repair or upkeep costs because the RVRSA "project" as defined in the 1971 Stipulation is "maintained in operation," as stated in the 1971 Stipulation's Paragraph 7.

iv. Counter-Claim

Defendant RVRSA counterclaims that Plaintiffs breached the 1984 Settlement Agreement by withholding payments for projects that they do not believe are operation, maintenance, and upkeep. The 1984 Stipulation of Settlement, signed by all the parties and approved by the Court, is a valid contract. JE-23. The same contract remains valid today. Defendants argue that the 1984 Stipulation of Settlement requires Jersey City to contribute to the operation, maintenance, repair, and upkeep costs of the plant in accordance with Paragraph 6(c). Defendants also claim that Jersey City has admitted to withholding payments, in contravention of their obligation as set forth in the Stipulation, since January 2010. JE-35; JE-43 ¶¶113-117. As a result, Defendants contend that Jersey City owes RVRSA its unpaid portion of operation, maintenance, repair, and upkeep for projects in conformance with Paragraph 6(c) of the Agreement.

"To establish a breach of contract claim, a plaintiff has the burden to show that the parties entered into a valid contract, that the defendant failed to perform his obligations under the contract

and that the plaintiff sustained damages as a result." Murphy, 392 N.J. Super. at 265. It is not disputed that Jersey City withheld payment to the RVRSA for what they deemed to be costs unrelated to repair, maintenance, operations, and upkeep. If the money withheld by Jersey City would be recovered as their proportionate share of repair, operation, maintenance, upkeep, or falls under an exception, then Jersey City has breached their agreement with the RVRSA. If the money withheld by Jersey City is for what is defined above as an enlargement or expansion, then Jersey City has not breached the agreement with the RVRSA. The evidence demonstrates that Jersey City did breach the Contract by withholding payments for operation, repair, and maintenance; however, to what extent is unclear. Therefore, while the Court finds that Jersey City did breach their agreement with the RVRSA by not making any contributions to continued operation, repair, and maintenance, the extent of the breach is uncertain. Furthermore, to the extent that RVRSA has assessed impermissible costs upon Jersey City, based upon the definitions provided above, those costs, if any, may serve as an offset to Jersey City's contributions to continued operation, repair, and maintenance.

f. Damages

R. 4:38-2(b) provides:

> Separation of Liability and Damage Claims. Whenever multiple parties, issues or claims are presented in individual or consolidated actions and the nature of the action or actions is such that a trial of all issues as to liability and damages may be complex and confusing, or whenever the court finds that a substantial saving of time would result from trial of the issue of liability in the first instance, the court may on a party's or its own motion, direct that the issues of liability and damages be separately tried. Except in extraordinary circumstances, the issue of liability shall be tried first and if the order of bifurcation otherwise directs, the reasons therefor shall be explicitly stated therein.
>
> [R. 4:38-2(b).]

The issue of bifurcation of liability and damages is left to the discretion of the court, which must make "a bona-fide consideration…as to whether the facts and circumstances of the particular case meet the stated criteria for a separate trial of liability." Powell v. Gen. Motors Corp., 107 N.J. Super. 29, 33 (App. Div. 1969). Bifurcation may be ordered in appropriate circumstances.[6] See Thompson v. Merrell Dow Pharm., 229 N.J. Super. 230, 255 (App. Div. 1988) (finding that "bifurcation of the issues of liability and damages is within the sound discretion of the trial judge" and accordingly applying an abuse of discretion standard on review); Johnson v. Malnati, 110 N.J. Super. 277 (App. Div. 1970) (finding that the trial court appropriately bifurcated liability and damages issues where an action had been on the trial list for over three years); Diodato v. Rogers, 321 N.J. Super. 326, 335-36 (Law Div. 1998) (finding that the "general object" of the bifurcation rule "is to further convenience, in part through calendar control, and to combat prejudice," and that its standards are "as flexible as required by furtherance of convenience, avoidance of prejudice, resolution of complexity and reduction of confusion"); Leventhal v. Leventhal, 239 N.J. Super 370 (Ch. Div. 1989) (citing judicial economy as a primary reason for use of bifurcation).

Here, the instant litigation began in 2010 and has lasted significantly longer than the three years at issue in Johnson. 110 N.J. Super. at 280. Eight years of litigation certainly implicates the interests of judicial economy and calendar control. The parties were unable to admit evidence at trial, nor could the Court assess damages, without first defining the terms of the Stipulations. A separate trial as to the issue of damages will further "the resolution of complexity and reduction of confusion" because the Court, in a separate trial, will be tasked solely with determining damages, if any. The issue of liability for breach has been determined, and the issue of damages is narrowly tailored.

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[6] Alternatively, the Court may, with the consent of all parties, refer the matter of damages to a special master under R. 4:41-1.

Thus, at the damages hearing, the Court must determine both the extent of Jersey City's damages, if any, caused by breach, as well as whether RVRSA assessed Jersey City a proportionate share of an impermissible cost under the definitions provided above. If there were impermissible assessments, they may offset any amount of damages assessed against Jersey City. Therefore, the Court finds that a "substantial saving of time" shall be realized from bifurcation, and orders a separate trial as to the amount of damages resulting from Jersey City's breach, and RVRSA's assessments.

III. Conclusion

Accordingly, the Court finds that Jersey City must contribute towards RVRSA's repair, operation, maintenance, and upkeep. The Court also finds that Plaintiffs are obligated to contribute towards RVRSA's operating, maintenance, repair or upkeep costs because the RVRSA "project" as defined in the 1971 Stipulation is "maintained in operation," as stated in the 1971 Stipulation's Paragraph 7. Finally, the Court finds that Jersey City did breach their agreement with the RVRSA, with regard to contributing to continued operation, repair, and, maintenance, by withholding funds for those expenses; however, to the extent, if any, RVRSA assessed impermissible costs under the definitions provided above, those costs shall offset damages, if any, arising from the breach. Thus, Jersey City may be eligible for partial judgment. A separate trial will be scheduled to determine the issue of damages. A conforming Order accompanies this Statement of Reasons.